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Gunneflo Book Symposium: The Author's Response

Markus Gunneflo: Writing the History of Columbus Arriving in Haiti

MARKUS GUNNEFLO — 12 April, 2017



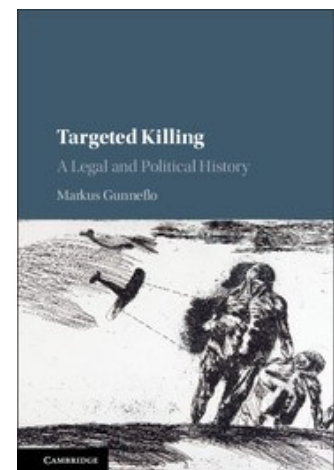
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I could not be happier that this book symposium turned out to be a forum for such wide-ranging and critical commentary about targeted killing. All contributors offer nuanced readings of my book while extending the analysis in several significant directions. In appreciation of both these aspects I want to use this opportunity for a brief response to describe the scope of the book – drawing on the contributors reading of it – and then turn to the ways in which the contributors extend and complicate my analysis of targeted killing.



Laurent Dubois writes: at the heart of every work of history is a question of positioning. Whose history are you telling? And from whose perspective? Or as the Haitian thinker Jean Casimir puts it: When you write the history of Columbus arriving in what the indigenous people then called Ayiti, you have to make a decision: are you on the boat or on the shore?

Targeted Killing: A Legal and Political History is a critical account of the emergence of targeted killing, consciously written from the perspective of the boat. The book starts from the astonishing claim that this form of state death-dealing is legal and serves the purpose of protection. As extreme as it is, this centring of protection and legality places targeted killing at the heart of the modern state.

Certain legal theories have privileged certain ways of looking at the history of targeted killing and the war on terrorism more generally. Offering a new understanding, emphasizing how war has been spreading *together with law* (Kalpouzos), my book revisits both that Weimar-era legal theorizing and that history-making.

This implies that the contexts, actors and law commonly associated with this practice – 9/11 and the second Intifada, Harold Koh and Aharon Barak, the AUMF and the 2006 Israel Supreme Court targeted killing case – will only appear at the tail-end of a much longer trajectory. Emphasis is instead shifted to earlier, previously unexplored (in the context of targeted killing) events, actors and law: The 1983 Beirut barracks bombing, US State secretary George P. Shultz and his legal adviser Abraham D. Sofaer and the recently declassified 1984 National Security Decision Directive 138, to name just a few from the American context. In this story, targeted killing does not emerge as a response to exceptional events as much as it is embedded in Israeli and US statecraft. The story further highlights the problematic relationship between sovereign authority and lawful violence not just in these two states but in the modern state system more generally.

Due to the victories of liberal rule of law thinking over decisionist forms of legitimation, these records show that even the most protection-centric, prone-to-prerogative-power states and state officials, increasingly are preoccupied with legality. Accordingly, it is not 'the exception' that has made targeted killing. It is the compulsion of law. Targeted killing does not signal pure politics overcoming law but the politics of law itself (Loevy). As noted by Samour, the book also trails the very much related thesis of Martti Koskenniemi about the post-WWII "fall" of international law – characterized by the pervasiveness but also instrumentalization of international law.

Elsewhere, the book has been described as an “important historical backdrop” to the “timely and pressing issues” raised by targeted killing. This appreciation of the book, however, is built on a notion of “past as history” with no claim on the present that effectively devaluates the entire effort. Anne Orford has convincingly shown that such neat separation between past and present concerns in law, is unsustainable. This is the case because law is “inherently genealogical, depending as it does upon the movement of concepts, languages and norms across time and even space. The past, far from being gone, is constantly being retrieved as a source or rationalization of present obligations.” At the end of the book I write that in spite of the title, the chronicling style and the historical material used, the idea was always to address the present. I also stress the urgency of historical work when, *legal* texts, laying down a specifically *legal* rationality, have played such an important role for the emergence of targeted killing. Consistent with this, Kalpouzos describes the book in terms of dealing with targeted killing “in its constitutional rather than its administrative dimensions, providing for the historical and legal thread that establishes killing as a means of the constitutional protection of citizens while distinguishing it from (unlawful) ‘assassination’ ... in situations of violence that defy clear categorization as either war or peace, international or non-international armed conflict ... The book concerns itself with how what may be administered is constituted”.

Against this background, I want to turn to how the contributors extend, and, occasionally, complicate the analysis.

Picking up a central aspect of my analysis of the Israeli case – the obliteration of the distinction between what Walter Benjamin refers to as law-making and law-preserving violence – Itamar Mann gives a riveting close-up of targeted killing in Israel through the case of Elor Azaria. Azaria was the Israeli soldier convicted for shooting the wounded Abd Al Fatah A-Sharif while he was laying on the ground posing no threat in the context of a stabbing attack. Since the arrest, Azaria has gained an ever-more-powerful surge of support among Jewish Israelis and Mann comments that when a legal system fails to uphold a distinction between law-making and law-preserving violence it may become difficult *for an entire society* to distinguish between war, criminal justice and revenge.

Mann notes that there runs a line all the way from the actions of paramilitary groups in the British mandate period to the public outcry for Azaria blurring the lines between the three objectives. I believe this assessment is very important and correct. What Mann sees as an underemphasizing of one of the elements – “justice as revenge” – in my treatment of the Israeli case is a consequence of the book's more limited focus on legal justification. As Mann points out, in institutionalized legal contexts the impulse of revenge has been denied completely. A space for targeted killing has instead been constructed between the other two elements – war and criminal justice. From the point of view of Benjamin's distinction, this can be explained by the fact that once a legal order is set up, the violent means of the state will be limited to the pursuit of “legal ends”. These are the legal powers of the state, its sovereignty, the security of the population and the more particular terms on which a state is founded and that the state perpetuates in sustaining and defending itself. Violence in the context of war, criminal justice but also that space in between for targeted killing can be framed in terms of serving such “legal ends”, but revenge is something else. While the failure of the Israeli legal order to uphold a distinction between law-making and law-preserving violence may have made it difficult for Israeli society to distinguish between war, criminal justice and revenge, the *institutionalized legal system* is still limited to “legal ends”. This may explain the emphasis on protection in targeted killing but also the fact that Azaria is embraced by Jewish Israelis as “our son” for his case of revenge while at the same time being sentenced (exceedingly leniently) by Israeli legal institutions.

At the center of the constitution of a sovereign authority that kills for constitutional protection, writes Ioannis Kalpouzos, is the legal category of war. A key insight of the book is the realization that thinking about counter-terrorism as war and the killing of designated terrorists as something else than assassination or murder precede 9/11 and the second Intifada by decades. These developments in Israel and the US are linked up with a movement throughout the 18th, 19th and 20th Centuries to recognize and delineate an intermediate space between a full subject of international law equal enemy and an illegitimate outlaw. The book describes several phases of how the charge of assassination in lethal counter-terrorism operations have been avoided: From a rather crude inclusion of the terrorist enemy in

the law of armed conflict as a legitimate targeted and the simultaneous exclusion from practically all its protection all the way to increasingly sophisticated doctrines applying the laws of non-international armed conflict in transnational settings or the laws of international armed conflict in other than inter-state settings and including those targeted in the category of civilians taking a direct part in hostilities. My account is very much focused on the specific issue of counter-terrorism and Kalpouzos indicates that there are more to be said about the interaction between not just humanitarian and aggressive counter-terrorism agendas but also the efforts within international criminal law of punishing individuals for war crimes. The “low threshold of wide applicability” suited for that narrow purpose may well play into the hands of such aggressive counter-terrorism agendas as the states pursuing them are overcoming yesteryears reluctance to the full application of that law.

This leads me to Jothie Rajah's welcomed supplement of the book's focus on state discourse with the reproduction of targeted killing in popular culture, more particularly in the motion picture *Eye in the Sky*. For, as Ntina Tzouvala has noted elsewhere, it is unquestionable throughout the film (in which the UK, with allies, is involved in a counter-terrorism operation in Kenya) that international humanitarian law applies, perhaps with some human rights added. Tzouvala notes the irony of this by reference to the refusal of the UK to apply that law “at home” in the context of the Troubles in Northern Ireland not long ago: “If in the 1980s war at home was a taboo, war is now omnipresent and eternal”.

Rajah deals with this question through the destabilizing effects of internationalizing the notion that lawful authority flows from the factual capacity and willingness to guarantee protection. The affect and narrative of *Eye in the Sky* perpetuates the displacement of lawful authority from local authorities to states with global counter-terrorism reach and ambitions. In doing so it also perpetuates the understanding that death is a precondition for sustaining life, the urgency of which is heightened by the dramatization of ticking-time bomb scenarios, and the idea that targeted killing is guaranteed by legal process complete with familiar tropes of liberal legality – hierarchies of authority, rules of procedure and adversarial argument.

Rajah argues that *Eye in the Sky* – with its dialogue on law, its technofetishism, and tropes of terrorists as “evil barbaric and inhuman” offset by US Air Force drone pilots intimately invested in protecting and saving Alia – shifts the citizen subject from a decision-making position into a dazzled audience. Rajah suggest that the ideological recognition creating this effect works not on the level of appeals, explanations and justifications but affect and narrative. With Althusser, we might say that it creates “obviousnesses”: “obviousnesses which we cannot *fail to recognize* and before which we have the inevitable and natural reaction of crying out (aloud or in the ‘still, small voice of conscience’) ‘That’s obvious! That’s right! That’s true!’.”[i]

My efforts of understanding the emergence of targeted killing parallels Karin Loevy’s important work of understanding emergency law “beyond the drama of exception”. Describing emergency law as a legal politics shaping forthcoming legal reality this work takes on torture, detention and other emergency and war practices and explains how she so accurately can describe and assess my book and the case of targeted killing as well. The move to normalize targeted killing, in a rule of law state, is due to a constant compulsion to realize official acts as legal. I refer to targeted killing in terms of a cycle of legality created by this compulsion where, in Dyzenhaus terms, the political constitution asserts itself under the guise of the legal constitution, reducing the rule of law to a “thin veneer of legality”. Loevy notes that the compulsion has more than one trajectory or cycle and that a different cycle opens when institutions cooperate in creating institutional controls, making sure that their actions are compatible with a substantive rule of law. This other cycle is left uncommented in the book and because of claims elsewhere that recent agreement on legal framework and “meritorious efforts to interpret the pertinent norms by balancing the rights and relevant considerations at stake” – is having effect, I want to just briefly comment that in the longer perspective of my book, this looks more like a thicker veneer of legality than substantive rule of law.

I opened with Laurent Dubois’ claim of the importance of positioning in historical work and by acknowledging that my book is consciously written from the boat carrying Columbus to the shores of what the indigenous people called Ayiti. From this perspective, it makes sense to

take seriously the claim that targeted killing is legal and that it serves the purpose of protection. The project begins, then, and is pursued from the standpoint of the modern state but it ends in legacies of imperialism and colonialism, what Nahed Samour describes as the legalizing of lawlessness – the underbelly of the modern state. Samour describes how my book is “irritated by” and how it “irritates” the doctrinal debates that attempt to govern targeted killing because they too are part of the legalization scheme. She further describes the depoliticizing effects of the individualization of enmity in terms of confronting (by putting to death) individuals rather than the violence and counter-violence they find themselves in. Samour zeroes in on the complex position of being subject to law but outside meaningful protection schemes in Gaza and beyond. She concludes by way of returning to Hobbes: “for those suffering from the everyday possibility of targeted killing ... not being protected by international or domestic law ... means that they will not be obedient to either”. As pleased as I am that Samour finds the book’s focus on legalization to present an “urgent, excellent opportunity to understand and contest these practices and developments” – her analysis forces me to return to Jean Casimir and that initial question of positioning: To the limits of writing a critical history of Columbus arriving in Haiti from the perspective of the boat and of the possibilities of writing it from the shore. I hope to be able to return to this question in future writings on targeted killing. Samour’s reference to an author that is irritated and irritates suggests that I wasn’t very happy on the boat anyways.

Markus Gunneflo is a postdoctoral researcher and lecturer in public international law at Lund University in Sweden.

[i] Althusser, Louis, “Ideology and Ideological State Apparatus (Notes Towards an Investigation)” in *Lenin and Philosophy and Other Essays*, introduction by Frederic Jameson, translated by Ben Brewster (2001) New York: Monthly Review Press.

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